PREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Docket No. 821

GENERAL TIME CORPORATION,

Petitioner,

—against—

SECURITIES AND EXCHANGE COMMISSION, TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., and CHESTNUTT CORPORATION,

Respondents.

REPLY BRIEF OF PETITIONER GENERAL TIME CORPORATION

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REPLY BRIEF OF PETITIONER GENERAL TIME CORPORATION

I.

Respondent Talley Industries, Inc. ("Industries") asserts that the Securities and Exchange Commission ("Commission") did *not* bring suit in the instant case to protect its exclusive primary jurisdiction under the Investment Company Act of 1940 (the "Act"). (Industries' brief, pp. 12, 14, 16 and 25). Industries is incorrect, as is demonstrated by the Commission's complaint in the District Court (Exhibit A hereto), the Commission's pro-

posed "Final Judgment of Permanent Injunction" (Exhibit B hereto), and the Commission's Memorandum "In Support of its Proposed Final Judgment of Permanent Injunction" (Exhibit C hereto).

In its complaint (Exhibit A) the Commission requested relief designed solely to protect its exclusive primary power to review and approve or disapprove joint transactions. Paragraph (1) of the prayer for relief sets forth the full parameters of the Commission's request—there the Commission sought

> "a temporary restraining order, preliminary injunction and permanent injunction . . . restraining and enjoining Industries, Fund and Chestnutt . . . [from taking any action with respect to General Time stock] without *first* having applied to the Securities and Exchange Commission for approval of such transaction, and without such approval having *first* been granted by order of said Commission." (Exhibit A, p. 5a) (emphasis supplied).

The Commission's proposed final injunction (Exhibit B), filed with the District Court after remand of the case from the July decision of the Court below, and its supporting memorandum (Exhibit C), were fully consistent with the Commission's complaint, and reaffirmed the Commission's position that "it is for the Commission, rather than for this Court, to determine whether such transaction, or any aspect of it, should be approved." (Exhibit C, p. 17a).

The Commission's assertion of exclusive power over the joint transaction between Industries and Fund was consistent with the language and purpose of the comprehensive legislative scheme fashioned by Congress to regulate mutual fund-affiliate activities. The Court below ignored that legislative mandate, refused to accede to the Com-

mission's exclusive primary jurisdiction, and then compounded that error by itself judicially reviewing and approving the joint transaction between Industries and Fund.

II.

Industries incorrectly asserts that General Time had no standing to appeal from the final judgment (and thus could not assert the Commission's primary jurisdiction) "[s]ince the judgment below was not in any way adverse to General Time . . . ." (Industries' brief, p. 17).

That judgment, however, imposed substantial restraints injurious to the interests of General Time, which alone are sufficient to support its right as a party to appeal. These include:

1. The restraint on General Time's right (as an affiliate whose stock was the subject matter of the joint transaction) to participate in the administrative proceeding that the Commission demanded be held to allow it to exercise its primary jurisdiction.

2. The subjection of General Time to the restrictions and obligations of the Act, although the parties with whom General Time is affiliated (Industries and Fund) have been exempted by the final judgment from the Act and licensed to take over General Time by means violative of §17(d).*

3. The prohibition in paragraph IV(B) of the final judgment, which prevents Industries from selling its Gen-

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* Indeed, the continuing ownership of General Time stock by Industries and Fund, sanctioned by the final judgment below, is the very basis of the affiliation which subjects General Time for an indefinite period, to the provisions and obligations of the Act and its numerous sections, e.g., §§ 17(a), 17(b) and 17(d). Clearly, review of that ownership was of direct interest and importance to General Time.

eral Time stock "pursuant to a tender offer from . . . an affiliated person [General Time], of Industries or of the Fund . . . ." (Appendix B to petition, p. 20a). Thus, *except for* the final judgment and the affiliations unlawfully created by the activities of Industries and Fund, General Time's powers to purchase its own shares from Industries would not have been impaired.

4. The subjection of General Time to the continuing jurisdiction of the District Court until Industries and Fund choose to meet conditions enumerated in the final judgment.

Indeed, the Commission aptly noted that, as a result of the final judgment,

> ". . . the wrongdoers [Industries and Fund] are left in a better position than they would have been had they complied with the law." (Brief of Securities and Exchange Commission to the Second Circuit, dated October 1968).*

The standing doctrine has never been applied in the hypertechnical manner urged by Industries. General Time's

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* That incongruous result was foreshadowed by the Commismission as early as May 1, 1968, when it filed its complaint:

> "In order to prevent defendants from occupying a more advantageous position, with respect to carrying out the underlying goal of the stock purchases, which the Commission has found to have been illegal than they would have occupied had they not violated the Investment Company Act, it is necessary and appropriate for this court to take steps to prevent giving effect to the votes cast by defendants in support of or in consummation of their illegal acts . . ." (Commission's "Memorandum of Points and Authorities In Support of Application for Temporary Restraining Order and Preliminary Injunction." Docket No. 68 Civil 1762).

personal involvement in this case as a party below* and as the target of the violative joint transaction assures the practical adverseness and concrete presentation of issues required by this Court. The ultimate outcome of the controversy is of direct and of substantial importance to General Time and to its stockholders who have no equity interest in Industries. In these circumstances, General Time has the right to assert the primary jurisdiction of the Commission because it is entitled to participate before the Commission in administrative proceedings under the Act. As noted by the Commission:

> "General Time will be entitled to participate before the Commission in accordance with the Commission's Rules of Practice and to elicit any relevant evidence . . . ." (Exhibit C, p. 18a).

Industries' assertions that General Time lacks standing because, allegedly, it is not covered by the Act, underscores the importance of whether or not "portfolio companies of investment companies and the general investing public" are covered "under the protective provisions of

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* General Time participated in the administrative evidentiary hearing before the Commission on April 16, 17 and 18, 1968, was named as a party-defendant in the Commission's complaint, fully participated in the district court trial proceedings, and participated in the Commission's appeal of the dismissal of its complaint by the district court. In these proceedings, General Time, for example, submitted evidence, cross-examined witness, filed briefs and made oral arguments.

the Act," the first question raised in General Time's petition in Docket No. 512, p. 3.*

The basic fallacy and inadequacy of Industries' approach to standing is apparent from its attempt to negate the principles espoused in *Baker* v. *Carr*, 369 U. S. 186 (1962), *Flast* v. *Cohen*, 392 U. S. 83 (1968) and *Puente de Reynosa S. A.* v. *City of McAllen*, 357 F. 2d 43 (5th Cir. 1966). Industries would limit those cases to controversies involving the public interest and claims this suit involves a mere private controversy. (Industries' brief, p. 19). But those cases are not so limited and, in any event, Industries overlooks that the instant controversy arose under a federal statute, the Act, and that General Time has multiple status under the Act (i.e., as a statutory affiliate, a portfolio company and a member of the investing public.) This is not a personal injury or contract case where the outcome is peculiarly personal to the parties involved. This suit is under the securities laws which, like the antitrust laws, were enacted for the benefit and protection of the public. Private actions to redress violations of federal statutes

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* General Time is constrained to note that Industries quotes twice in its brief (pp. 5 and 23) from Investment Company Act Release No. 5128 (Oct. 13, 1967) in support of its contention that the Act is designed solely to protect "investment companies and their stockholders from being taken advantage of by affiliates" (p. 23). Industries, however, disregarded the Act's breadth of coverage as recognized by the Commission in the very same paragraph of that Release:

> "The Commission believes that it is necessary and appropriate *for the protection of investors and in the public interest to require applications to be filed with the Commission* so that it may consider situations where a significant conflict of interest occurs with *respect to ownership of portfolio investments by the investment company and its affiliated persons.*" (p. 2) (emphasis supplied).

are encouraged, see, e.g., *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 751-52 (1947); *Studebaker Corp.* v. *Gittlin*, 360 F. 2d 692, 697-98 (2d Cir. 1966); *United States* v. *Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 171 (S. D. N. Y. 1955).

The petition of General Time for a writ of certiorari should be granted.

Respectfully submitted,

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Exhibit A

Complaint

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1762

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

—v.—

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, AND GENERAL TIME CORPORATION,

Defendants.

1. It appears to the plaintiff, Securities and Exchange Commission ("Commission"), that defendants American Investors Fund, Inc. ("the Fund"), Chestnutt Corporation ("Chestnutt") and Talley Industries, Inc. ("Industries") have been and are now engaged in acts and practices which constitute violations of Section 17(d) of the Investment Company Act of 1940 ("the Act"), 15 U.S.C. 80a-17(d), and Rule 17d-1 thereunder, 17 CFR 270.17d-1. The Commission, pursuant to Section 42(e) of the Act, 15 U.S.C. 80a-41(e), brings this action to enjoin such acts and practices and for other relief.

2. This Court has jurisdiction under Section 44 of the Act, 15 U.S.C. 80a-43.

3. Each of the defendants is an inhabitant of, transacts business in, or may be found in the Southern District of New York. The acts and transactions complained of took place in substantial part within said district.

4. Defendant Fund is a diversified open-end investment company registered under the Act.

5. Defendant Chestnutt is defendant Fund's investment adviser.

6. Defendant Industries is a corporation of which more than 5% of the outstanding voting shares are owned by the defendant Fund and have been at all times mentioned herein.

7. By reason of defendant Fund's ownership of more than 5% of the outstanding common stock of defendant Industries, Industries is an "affiliated person" of the Fund within the meaning of Section 2(a)(3) of the Act, 15 U.S.C. 80a-2(a)(3).

8. Defendant General Time Corporation ("General Time") is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the State of Connecticut. Defendant Industries owns 257,937 shares of the common stock of General Time. defendant Fund owns 210,000 shares of the common stock of General Time.

9. On or about December 29, 1967, Franz G. Talley, president of defendant Industries, advised George A. Chestnutt, Jr., president of defendant Fund and of defendant Chestnutt, that Industries was buying the stock of defendant General Time with a view to Industries' effecting a merger with General Time and induced the Fund to enter

into a program with Industries to purchase the common stock of General Time through a common broker, M. Kimelman & Co. ("Kimelman"), so that Industries would be in a position to effect a merger with General Time.

10. Pursuant to this program, defendant Industries acquired 257,937 shares of common stock of defendant General Time between December 26, 1967, and February 23, 1968, of which all except 66,437 shares were acquired through Kimelman; and defendant Fund acquired between January 5, 1968, and February 15, 1968, through Kimelman, 210,000 shares of common stock of General Time.

11. By reason of the acts alleged in paragraphs 9 and 10, since on or about December 29, 1967, and continuing to the date hereof, defendant Industries and defendant Fund have been engaged in a joint transaction looking toward a merger of Industries and General Time.

12. By reason of the acts alleged in paragraphs 9 and 10, since on or about December 29, 1967, and continuing to the date hereof, defendant Industries has been effecting a transaction or transactions in which defendant Fund is a joint or a joint and several participant with Industries within the meaning of Section 17(d) of the Act and in contravention of Rule 17d-1 thereunder.

13. On March 27, 1968, a joint application was filed with the Commission by defendant Industries and by defendant Fund, seeking an order declaring that certain of their activities, including those set forth in paragraph 10 hereof, were not subject to Section 17(d) of the Act or Rule 17d-1 thereunder or in the alternative, seeking approval, *inter alia*, of those transactions.

14. On April 19, 1968, the Commission, passing upon the joint application, found that the program of defendant Industries and defendant Fund constituted a joint arrangement within the meaning of Section 17(d) of the Act and Rule 17d-1 thereunder; that Industries' acquisition of the shares of defendant General Time had been in violation of the Act; and the Commission refused to grant approval of the joint arrangement. A copy of the Commission's Memorandum Opinion and Order Denying Application (Investment Company Act Release No. 5358) is attached hereto as Exhibit A and made a part hereof.

15. In connection with the Annual Meeting of Shareholders of defendant General Time, scheduled to be held on April 22, 1968, defendant Industries supported a slate of nominees for directors (the Opposition Slate) in opposition to that proposed by the management of General Time and solicited proxies in favor of the Opposition Slate.

16. The Annual Meeting of Shareholders of defendant General Time was held on April 22, 1968, and the votes of its shareholders, including the votes of defendant Industries and defendant Fund, were cast either in person or by proxy. The meeting was adjourned, to be reconvened on May 3, 1968, when the count of the inspectors is scheduled to be presented.

17. Unless restrained and enjoined defendant Industries and defendant Fund will continue to engage in the unlawful acts and practices set forth in this complaint or obtain benefits from the unlawful acts and practices in which the Commission has found that they have been engaged.

WHEREFORE, the Securities and Exchange Commission, plaintiff herein, respectfully demands:

(1) That a temporary restraining order, preliminary injunction and permanent injunction be entered restraining and enjoining defendants Industries, Fund and Chestnutt and each of them, and their directors, officers, agents, servants, employees, attorneys and those persons in active concert or participation with them from directly or indirectly, acquiring, or participating in the acquisition of, any further shares of defendant General Time, or taking any other action, in any transaction in which the Fund is a joint or a joint and several participant with Industries, without first having applied to the Securities and Exchange Commission for approval of such transaction, and without such approval having first been granted by order of said Commission.

(2) That the temporary restraining order contain provisions restraining defendant General Time and its directors, officers, agents, servants, employees, attorneys and those persons in active concert or participation with it from directly or indirectly reconvening the Annual Meeting of Shareholders held on April 22, 1968, or in any manner giving effect to the votes of shareholders cast at such meeting, or holding any other meeting of shareholders of General Time until a preliminary injunction is entered.

(3) That the preliminary and permanent injunctions contain provisions

(a) requiring defendants Industries and Fund to withdraw any votes previously cast at the Annual Meeting of Shareholders of defendant General Time held on April 22, 1968, for shares which the Commission found Industries and Fund had acquired pursuant to a joint arrangement and enjoining Industries and Fund from

voting any such shares for nominees for directors whose names have been or may be proposed directly or indirectly by or on behalf of Industries or as supporting a merger or consolidation or other combination of General Time with Industries or from voting any such shares for any merger or consolidation or other combination of General Time with Industries at any future meeting of shareholders of General Time;

(b) enjoining defendant Industries from inducing defendant Fund or any other registered investment company of which it is an affiliated person, through such company's investment adviser or otherwise, from entering into any joint transaction with Industries in violation of Section 17(d) of the Act and Rule 17d-1 thereunder;

(c) enjoining defendant Fund from entering into any other joint transaction with defendant Industries or any other affiliated person in violation of Section 17(d) of the Act and Rule 17d-1 thereunder;

(d) enjoining defendant Chestnutt from advising, aiding or abetting the defendant Fund or any other registered investment company as to which Chestnutt is an investment adviser to engage in any joint transaction with any affiliated company in violation of Section 17(d) of the Act and Rule 17d-1 thereunder;

(e) that should the order of the Commission, dated April 19, 1968, and attached hereto, be reversed or modified, appropriate modification of the preliminary and permanent injunctions will be made.

(4) Such other and further relief as the nature of the case may require and as the Court may deem proper.

Respectfully submitted,

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.....

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May 1, 1968.

Exhibit B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1762

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, AND GENERAL TIME CORPORATION,

Defendants.

FINAL JUDGMENT OF PERMANENT INJUNCTION

This matter having come on for trial before me without a jury and this Court having issued a final judgment and order dismissing the complaint as to all defendants; and the Court of Appeals for the Second Circuit having on July 31, 1968 issued its opinion reversing the said judgment and directing this Court to proceed promptly to formulate an injunction consistent with its opinion, and the mandate of the said Court of Appeals having been transmitted to this Court on September 13, 1968;

Now, pursuant to said opinion and mandate of the Court of Appeals, this Court having requested and obtained suggestions and briefs from the parties concerning the proposed permanent injunction to be entered herein,

and upon all of the proceedings heretofore had and due deliberation having been had thereon, it is hereby

ORDERED, ADJUDGED AND DECREED that, unless and until an application pursuant to Section 17(d) of the Investment Company Act of 1940, 15 U. S. C. 80a-17(d), and Rule 17d-1 thereunder, 17 CFR 270.17d-1 first has been filed with and has been granted by an order of the Securities and Exchange Commission ("Commission"):

1. Defendants Talley Industries, Inc. ("Talley"), American Investors Fund, Inc. ("the Fund"), and Chestnutt Corporation ("Chestnutt"), and each of them, and their directors, officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them be and they hereby are permanently enjoined from directly or indirectly acquiring, or participating in the acquisition of, any further shares of stock of defendant General Time Corporation ("General Time"), or taking any other action in any transaction in which the Fund is a joint or a joint and several participant with Talley;

2a. Talley and the Fund be and they hereby are required to withdraw any votes previously cast at the Annual Meeting of Shareholders of General Time held on April 22, 1968 for shares of General Time purchased or otherwise acquired by Talley or the Fund between December 26, 1967 and April 22, 1968;

2b. Talley and the Fund be and they hereby are permanently enjoined from voting at any time any such shares for nominees or directors whose names have been or may be proposed directly or indirectly by or on behalf of Talley;

2c. Talley and the Fund be and they hereby are permanently enjoined from voting at any time any such shares for acquisition of General Time by Talley or any merger or consolidation or other combination of General Time with Talley;

3. Talley and its directors, officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them, be and they hereby are permanently enjoined from inducing the Fund, or any other registered investment company of which it is an affiliated person, through such company's investment adviser or otherwise, to enter into any transaction in which it is a joint or a joint and several participant with Talley;

4. The Fund be and it hereby is permanently enjoined from entering into any other transaction in which it is a joint or a joint and several participant with Talley or with any other affiliated person;

5. Chestnutt be and it hereby is permanently enjoined from aiding or abetting the Fund or any other registered investment company as to which Chestnutt is an investment adviser in any transaction in which such registered investment company is a joint or a joint and several participant with any affiliated person;

6. Talley and the Fund be and they hereby are permanently enjoined from transferring or otherwise disposing of any of their shares of General Time stock purchased or otherwise acquired by Talley or the Fund between December 26, 1967 and April 22, 1968, or any securities held in lieu thereof as a result of any issue of securities in exchange for shares of General Time stock outstanding at the date of this order, so long as (1) Talley is an affiliated person of the Fund and (2) both the Fund and

Talley, directly or indirectly, own, either of record or beneficially, or control or hold with power to vote, any such shares;

All of the words and terms used in this order, including the term "affiliated person," are to be construed as defined in the Investment Company Act of 1940.

Dated: New York, New York
September , 1968

.....
United States District Judge

JUDGMENT ENTERED

.....
Clerk

Exhibit C

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 1762

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TALLEY INDUSTRIES, INC., AMERICAN INVESTORS FUND, INC., CHESTNUTT CORPORATION, and GENERAL TIME CORPORATION,

Defendants.

MEMORANDUM OF THE SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF ITS PROPOSED FINAL JUDGMENT OF PERMANENT INJUNCTION

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STATEMENT

On May 1, 1968, the Commission instituted an injunction action in this Court, among other things, to compel Talley Industries, Inc. ("Talley") and American Investors Fund, Inc. ("the Fund") to withdraw the votes they had cast at a meeting of the shareholders of General Time Corporation ("General Time") in support of Talley's attempt to take over General Time, because they had acquired General Time shares, so voted, in violation of Section 17(d) of the Investment Company Act of 1940, 15 U. S. C. 80a-17(d), and Rule 17d-1 thereunder, 17 CFR 270.17d-1. On July 31, 1968, the Court of Appeals for the Second Circuit reversed the dismissal by this Court of the Commission's complaint and upheld the Commission's finding [1] that Talley and the Fund had violated the Act. The Court of Appeals directed this Court to proceed promptly to formulate an injunction consistent with its opinion.

Submitted herewith is a proposed final judgment of permanent injunction. The proposed injunction generally

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[1] Memorandum Opinion and Order Denying Application, *In re Talley Industries, Inc.*, Investment Company Act Release No. 5358, April 19, 1968.

directs the relief requested in the Commission's complaint. The proposed injunction enjoins the defendants from further or future violations of Section 17(d) and Rule 17d-1. It also provides that, unless and until application first has been filed with and granted by an order of the Commission, as to such shares of General Time already acquired by Talley and the Fund in violation of the Act, Talley and the Fund are required to withdraw their previous votes at the April 22, 1968 General Time shareholders' meeting and may not vote such shares in connection with any attempted takeover of General Time. In addition, until a Commission order is obtained, Talley and the Fund may not acquire any additional General Time shares nor may they sell or dispose of any General Time shares or any securities held in lieu thereof.

In its Post Trial Brief (pp. 32 *et seq.*), the Commission discussed the power of this Court to grant the relief sought in the Commission's complaint and reasons for the necessity to prevent the voting of the illegally acquired General Time shares. In order not to burden this Court unduly, material contained in the post-trial brief will not be repeated here, but the following will be supplemental to that material.

In fashioning relief, it is appropriate that this Court bear in mind that the Court of Appeals expressly stated that "... we do not undertake to particularize the form of a decree ..." (slip op. p. 3,345). This in part is a reflection of the fact that the briefing and oral argument by the Commission and the other parties in connection with the appeal centered principally on the Commission's attempt to reinstate its complaint which had been dismissed by this Court, and to achieve a decision on the merits that Talley and the Fund had been involved in a transaction which required compliance with the Investment Company Act. Accordingly, Judge Friendly's noting that "as at present

advised'' he did not see how the interests of shareholders could be advanced by provisions requiring Talley and the Fund to withdraw votes cast at the April 22 General Time shareholders' meeting and enjoining further voting by them, does not, in our view, connote any rejection of that type of relief but appears, rather, to invite a discussion and determination by this Court as to the propriety of such relief.

ARGUMENT

I. Unless Undertaken With Approval of the Commission, All the Activities of Talley and the Fund Looking Towards the Attempted Takeover of General Time Constitute Continuing Violations of the Act.

A decree such as we propose, which prohibits Talley and the Fund from ''taking over'' General Time without approval by the Commission, is necessary to stop a continuing violation of Section 17(d).[2] While the Court of Appeals did not delineate the exact scope of the ''transaction'' which it found to have been entered into in violation of Section 17(d) because the required approval of the Commission had not been obtained, it seems reasonably clear, not only from the opinion of the Court of Appeals (slip op., p. 3,342) but from the record, that this involved more than the mere purchase of General Time stock by Talley and the Fund at or about the same time. Rather, Talley and the Fund entered into a ''combination'' for the purpose of accomplishing a takeover of General Time (*id.*). The admitted

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[2] As noted, *all* of the prohibitions in the proposed injunction are subject to an order of the Commission which may permit such otherwise proscribed activity. That is, the Commission, in an order under Section 17(d) and Rule 17d-1, or under other appropriate sections or rules, may permit, for example, voting of the shares, acquisition of additional General Time shares, sale or other disposition of the shares, etc.

objective of Talley was to bring about a merger with General Time (*id.* at 3,332). The objective of the Fund was also to bring about a merger of General Time, either with Talley or perhaps with some other company if such a company made an offer which Talley did not choose to meet.[3] It was with this objective that the Fund made an investment which clearly departed from its usual investment practices, if not from its stated investment policies.[4]

Once it is recognized that the transaction involves more than the mere purchase of stock, it is clear that, short of ordering divestiture of the stock, an injunction against consummation of the takeover without Commission approval is the only way to prevent a continuing violation. Section 17(d) of the Act and Rule 17d-1 thereunder, which rule has been held valid by the Court of Appeals, required Commission approval of the entire transaction, not merely of a part of it. Had Talley and the Fund applied to the Commission for approval of the transaction before initiating it, the Commission, had it approved the acquisition of the stock, would have retained continuing jurisdiction over further steps in the transaction, including the takeover itself. The fact that Talley and the Fund initiated the transaction without seeking such approval, and then, after the Commission had issued its order declining to approve the transaction, chose to ignore that order[5] and

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[3] Pages 30-31 of the transcript of testimony of George A. Chestnutt, Jr., before the Commission.

[4] *Id.*

[5] We recognize that Talley and the Fund believed that the Commission's order was erroneous, both on the law and on the facts. This belief, however, did not entitle them to ignore the order; their remedy, rather, was to seek judicial review, to which they were entitled, and to refrain from consummating the trans-

(*Footnote continued on following page*)

proceed with the transaction, does not deprive the Commission of continuing jurisdiction with respect to it.

The Court of Appeals left open the question of the appropriate relief in this case. It considered what would be the appropriate remedy in a court of equity for a past violation which was purely a matter of history in order to prevent the recurrence of violations in the future and suggested that for this purpose an injunction against the take over might be unduly "drastic." With all deference to the Court of Appeals, this overlooks the need for such a decree to stop the continuing violation.[6] Furthermore, since Rule 17d-1, which the Court of Appeals found to be a valid exercise of the Commission's authority under the Act, makes it unlawful to engage or participate in a joint transaction without Commission approval, it is respectfully submitted that it is for the Commission, rather than for this Court, to determine whether such transaction, or any aspect of it, should be approved. Consequently, for this Court to determine whether or not Talley and the Fund should be permitted to take over General Time with-

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(*Footnote continued from preceding page*)

action until it was either approved by the Commission or the Commission's order was set aside by a court. See *United States* v. *United Mine Workers*, 330 U. S. 258 (1947). In any event, however, now that the Court of Appeals has, in effect, upheld the Commission's order, this Court should not sanction their continuing disregard of it.

[6] This oversight is understandable in view of the fact that this Court never reached the question of the appropriate remedy, and, as we noted, *supra* p. 2, in the Court of Appeals the primary, if not the exclusive, attention of the parties was devoted to the issue of whether there was any "joint transaction" anywhere in the picture and to the issue of whether the Commission's Rule 17d-1 was valid. The Court of Appeals accordingly found it unnecessary to determine what the scope of the joint transaction was, once it had found that such a transaction existed.

out the approval of the Commission would be, in the words of the Supreme Court, "an unwarranted incursion into the administrative domain." *Securities and Exchange Commission* v. *New England Electric System,* 390 U. S. 207, 211 (1968).

If this Court conditions consummation of the transaction upon Commission approval, as required by the rule, certain evidentiary and procedural questions which have been a source of some recent concern in this proceeding will be elimated. If Talley and the Fund apply for Commission approval of the takeover, they would be entitled to attempt to demonstrate that refusal by the Commission to permit the takeover would work substantial hardship on their shareholders. General Time will be entitled to participate before the Commission in accordance with the Commission's Rules of Practice and to elicit any relevant evidence with respect to whether or not consummation of the takeover will be in the interest of the Fund's shareholders or otherwise permissible under the standards outlined in Rule 17d-1. If the Commission should deny any application in this regard by Talley and the Fund, they would of course be entitled to judicial review under the Act. Thus, the question of whether or not the takeover should be consummated will be determined, in the first instance, by the Commission in the exercise of its authority and responsibility under the Act, subject to judicial review.

II. Even Should This Court Narrowly Construe the Joint Transaction as Being Limited to the Acquisition of the General Time Stock, and Not Consider the Activities Related to the Takeover Attempt as Constituting a Continuing Violation of the Act, the Relief Requested by the Commission Nonetheless Should be Granted.

The Court of Appeals held that Talley and the Fund, as the Commission had alleged in its complaint, had violated the Investment Company Act by not having first sought and obtained an order of the Commission permitting those companies to acquire the General Time stock. The avowed purpose of the acquisition of General Time stock was to enable Talley to mount an attempted takeover of General Time. We respectfully submit that, should this court merely enjoin any possible future violation of Section 17(d) without, at the same time, preventing Talley and the Fund from voting the shares towards an acquisition of or merger with General Time, the unlawful course of conduct would be in effect condoned in that the wrongdoers would be permitted to retain the fruits of their wrong.

The continued efficacy of enforcement by government regulatory agencies of the statutes administered by them requires relief from the courts, which, in addition to providing justice in particular cases involved, seeks effectively to deter similar future violations. For these reasons, this Court should take steps to prevent the fruition of the goal to which the illegal activities were aimed, at least where it cannot be demonstrated that precluding defendants from obtaining their goal will injure those the statute seeks to protect. The determination should be made by the Commission. It cannot be assumed that a refusal to permit the takeover here will work any particular harm to the shareholders of Talley or of the

Fund, whether Talley and the Fund may continue to hold their shares of General Time stock as an investment (which is in accord with the objectives of the Fund) or should dispose of part or all of their holdings pursuant to an order of the Commission. The risk of the market—that the price of stock may go down as well as up—is inherent in any purchase of stock and does not in any way particularly flow from the circumstances here.[7] Should stockholders of either company deem themselves damaged by such restrictions on their companies' holdings of General Time stock as may be decreed by this Court, the stockholders may be able to seek redress against those individuals directly responsible for violation prompting such relief.

The considerations militating in favor of granting the relief requested are supported by judicial precedent. The United States Supreme Court has recognized, as factors to be weighed by district courts when fashioning equitable relief, that a wrongdoer should not be permitted to retain the fruit of his unlawful acts and that the relief should provide an efficacious deterrent to future violations of the statute involved. In *Schine Theatres* v. *United States*, 334 U. S. 110 (1948), the United States brought suit under Sections 1 and 2 of the Sherman Act, 15 U. S. C. 1 and 2, seeking an injunction against continued violations and divestiture of Schine's illegally obtained theatres, even though the Sherman Act did not specifically provide for divestiture. In granting the relief, the Court noted:

> In this type of case we start from the premise that an injunction against future violations is not ade-

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[7] It should be noted that the proposed prohibition against voting the shares for acquisition of General Time applies only to Talley and the Fund and would not follow the General Time shares into the hands of any purchaser.

> quate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees. [Citation omitted]
>
> To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the anti-trust laws. Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project. *Id.* at 128.

In *Securities and Exchange Commission* v. *Quing N. Wong,* 252 F. Supp. 608 (D. P.R., 1966), the Commission alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5, and Sections 17(a), 17(d), and 37 of the Investment Company Act of 1940, 15 U. S. C. 80a-17(a), 80a-17(d) and 80a-36. In addition to an injunction, the Commission requested that the court compel the defendants to make restitution to the investment company. In rejecting one defendant's contention that it was improper for the Commission to seek restitution, the court (p. 614) quoted from *Schine* v. *United States, supra,* emphasizing that complete and effective relief required depriving the wrongdoer of his unlawfully-attained gain.

The Supreme Court has recognized that where the courts must make a choice between protecting private interests from injury and the enforcement of a statute, that " . . . courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 326 (1961). In that case a civil antitrust proceeding, the Supreme Court directed the entry of a decree requiring du Pont to divest itself completely of the approximately 23% of the common stock of General Motors Corporation which, the Court held, tended towards a monopoly in violation of Section 7 of the Clayton Act, 15 U. S. C. 18. The Supreme Court rejected the objection of du Pont " . . . that the Government's plan of complete divestiture entailed harsh income-tax consequences for du Pont stockholders and, if adopted, would also threaten seriously to depress the market value of du Pont and General Motors stock" (*id.* at 320). Du Pont had proposed, in lieu of divestiture, that it would retain all attributes of ownership of the General Motors stock, including the right to receive dividends and a share of assets on liquidation, but that it would "pass through" the right to vote the General Motors stock to du Pont's shareholders proportionally to their holdings of du Pont's own shares (*id.* at 320). Du Pont alternatively agreed that it would be willing to have all of its General Motors stock be disenfranchised, if that would satisfy the requirement of effective relief (*id.* at 333). The Supreme Court impliedly was critical of the district court because " . . . the record is concerned mainly with the alleged adverse tax and market effects of the Government's proposal for complete divestiture" (*id.* at 325). The "primary focus of inquiry," said the Court, should have been on the question of the relief required in view of the violation of the statute. The Court said " . . . the suit has been a futile exercise if the Government proves a violation

but fails to secure a remedy adequate to redress it" (*id.* at 323). The Supreme Court agreed that complete divestiture by du Pont of the General Motors stock was required, as urged by the Government, and that restrictions on voting power were not sufficient. But it indicated that the same result would have followed even if the Court had been in doubt.

> "For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor" (id. at 334) [footnote omitted].[8]

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[8] In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189 (1944), defendants complained of the provisions in an anti-trust divestiture decree. In this connection, the Supreme Court stated:

> "It is said that these provisions are inequitable and harsh income tax wise, that they exceed any reasonable requirement for the prevention of future violations, and that they are therefore punitive.
>
> * * *
>
> "Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience."

Conclusion

For the foregoing reasons the Court should enter the proposed Final Judgment of Permanent Injunction submitted herewith.

Respectfully submitted,

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